added that even after the meeting the defendant assured him that he would be paid in full. He agreed that this was a fraudulent preference but he explained that he was more interested in his own debt than in those due to the other creditors and that there was nothing to prevent the defendant from making a similar fraudulent arrangement with some of the other creditors. I reject this suggestion on his part that the defendant was a party to any such fraud. In my opinion the defendant was a thoroughly honest man who was doing his best to prevail on all his creditors to accept a lesser rateable distribution which would be fair to all. Although he told them that he would, despite the composition, try to pay them all in full at some later date, if possible, this was due to his emotional state and I am satisfied that he did not intend to prefer any one or more of them to the disadvantage of the others.

On the evidence, I find, as a fact, that Mohamed Shariff did not walk out of the meeting before the proposal put to the meeting on behalf of the defendant had been accepted. Not one single question was directed to the witnesses for the defence either to confirm or to negative this walk-out on his part. Even his counsel confessed to ignorance of this and I can only conclude that the idea of a walk-out was an improvisation made on the spur of the moment in the witness-box to strengthen his case. I am satisfied that he did remain at the meeting until its conclusion and that he acquiesced in the proposal that all the creditors should be paid equally out of the proceeds of sale of the defendant's stock-in-trade. I am also satisfied that he made no protest whatsoever and that, if he was disgruntled at all during the meeting, this was because his own offer to enrich himself at the expense of the other creditors had been rejected. It should be noted that, although he offered only about $14,000 for the entire stock-in-trade of the defendant, his own valuation, as given in evidence, was that it was worth about $16,000 or $17,000. The goods were in fact sold for $19,000 which he agreed was a good return.

His conduct in the matter throughout seems to me to be such that, in my opinion, it would be unconscionable to allow him, in all the circumstances, to exact or recover payment in full after he had led the other creditors at the meeting to believe that he was "in the same boat" as themselves, all sharing rateably in the proceeds, and thereby induced them to exercise forbearance in demanding the full amounts due on their own respective claims.

It is clear from the authorities that —

"A creditor shall not bring an action, where others have been induced to join him in a composition with the debtor; each party giving the rest reason to believe that, in consequence of such engagement, his demand will not be enforced. This is, in fact, a new agreement, substituted for the original contract with the debtor, the consideration to each creditor being the engagement of the others not to press their individual claims." (*per* Lord Tenterden C.J. in *Good* v. *Cheeseman*[1]).

Such a composition agreement may be made verbally or in writing or partly in writing and partly verbally. (*Halsbury's Laws of England* 3rd Edn. Vol. 2 at page 609). Although it usually takes the form of an agreement in writing the fact that, as in the present action, it was made verbally is no bar to acceptance of the fact of its existence provided I am satisfied, as indeed I am, that it is proved to have been duly made.

The defendant accordingly succeeds in his submission that only the sum of $1,738.90 is due to the plaintiff under the composition agreement.

The plaintiff company will therefore receive judgment in that amount but will be condemned in the costs of this action as its representative has failed hopelessly in his almost impertinent, if not dishonest attempt, to rebut the defendant's assertion that the composition was lawful and binding on him and that it discharged the original debt.

Judgment for the plaintiff.

Solicitors:—*Abishega-Naden & Co.; Muthu & Co.*

RE MISKIN ROWTER

[O.C.J. (Tan Ah Tah J.) August 23, 1963]

[Singapore — Originating Summon No. 120 of 1962]

Infant—Custody—Illegitimate child—Principles to be considered—Guardianship of Infants Ordinance (Cap. 16), s.6

When considering the question of the custody of an illegitimate child, two principles, among others, have to be borne in mind: (a) the court must have regard primarily to the welfare of the infant; the paramount consideration must be the welfare of the infant; (b) the wishes of the natural mother should be considered.

In the circumstances of this case having regard to the two principles and exercising the court's discretion the applicant should have the custody of the infant because that would result in the infant not only living with his natural mother but with his natural father as well, although the infant told the Judge in Chambers that he wished to remain with the respondent.

Cases referred to:—

(1) *The Queen* v. *Nash* (1883) 10 Q.B.D. 458.

(2) *Barnardo* v. *McHugh* [1891] A.C. 388.

ORIGINATING SUMMONS.

R. Ramason for the applicant.

Ho Thian Cheh (Asst. Director of Legal Aid) for the respondent.

Tan Ah Tah J.: This was an application for the custody of an illegitimate male child named Miskin Rowter who was born on the 13th December 1952. The applicant is the infant's natural mother and the infant's putative father is one Sahul Hameed bin Hassan.

The facts of the case may be summarised as follows. When the infant was 16 days old the applicant went to see the respondent, who is her nephew, and asked him to bring up the child. It would appear that from about that time the infant has been brought up in the home of the respondent and his wife.

On the 1st March 1953 the applicant went through a ceremony of marriage with Sahul Hameed. The Registrar of Muslim Marriages officiated at this ceremony which would have resulted in the applicant and Sahul Hameed becoming husband and wife had it not been for the fact that Sahul Hameed had previously married another woman in the Registry of Marriages and had not divorced her.

I was satisfied that the applicant had not surrendered the infant to the respondent, as was alleged by his counsel, but had only asked him to take care of the infant for her. I was also satisfied that the reason why the applicant had done so was because she was unemployed at the time. I found as a fact that the applicant visited the infant from time to time and bought milk and clothes for him.

The applicant is employed as a domestic servant at the General Hospital, Singapore at a monthly salary of $126.00. Sahul Hameed is employed as a mandore in the Government Health Department and he earns a monthly salary of $145.00. As for the respondent, he is employed as a clerk in Bata Shoe Store at a monthly salary of $265.50. Comparing the financial circumstances of the parties to this case and taking into consideration the fact that the respondent has to support his wife, I came to the conclusion that there was no great difference in their financial circumstances.

When considering the question of the custody of an illegitimate child, two principles, among others, have to be borne in mind. The first principle is that the court must have regard primarily to the welfare of the infant; the paramount consideration must be the welfare of the infant. The second principle is that the wishes of the natural mother should be considered.

The first principle is too well known to require any authority to support it. An illustration of the second principle may be found in *The Queen* v. *Nash*,[1] part of the headnote of which reads as follows:

> "*Held*, that the appeal must be dismissed, for that the mother of an illegitimate infant has a natural right to its custody, which will be regarded by the Court."

Another illustration of the second principle is afforded by the case of *Barnardo* v. *McHugh*.[2] The following is a passage from the judgment of Lord Herschell at p.398:

> "All the Courts are now governed by equitable rules, and empowered to exercise equitable jurisdiction. As was said by Sir George Jessel M.R., in *Reg.* v. *Nash (supra)*: 'In equity regard was always had to the mother, putative father, and relations on the mother's side.' In that case the mother of an illegitimate child sought to have it delivered to her in order that it might be placed under the care of her sister. The child was in the custody of the wife of a labouring man, with whom it had been placed by the mother, who was living with another man as his mistress. The Court, notwithstanding the opposition of the person in whose custody it was, ordered that the child should be delivered into the custody desired by the mother. I think this case determines (and I concur in the decision) that the desire of the mother of an illegitimate child as to its custody is primarily to be considered. Of course, if it can be shewn that it would be detrimental to the interest of the child that it should be delivered to the custody of the mother or of any person in whose custody she desires it to be, the Court, exercising its jurisdiction, as it always does in such a case, with a view to the benefit of the child, would not feel bound to accede to the wishes of the mother."

In the present case the infant is the applicant's only son, and she has expressed a wish to bring him up herself. Counsel for the respondent submits that she should not be given custody of the infant as she is living in adultery with Sahul Hameed. In my opinion this case is quite different from those cases in which wives have left their husbands in order to live with their paramours and still insist on having the custody of their children. The applicant has gone through a ceremony of marriage with Sahul Hameed before the Registrar of Muslim Marriages and I am satisfied that in their community they are regarded as a respectable married couple.

The infant was brought to my Chambers and, in answer to my questions, said that he wished to remain with the respondent, that he was happy living where he was and that he did not wish to go to live with the applicant. Having regard to the fact that he had been brought up by the respondent and his wife since he was about 16 days old, I thought it natural that he should give the answers which he did.

Giving due attention to the two principles to which I have referred, namely that the court must have regard primarily to the welfare of the infant and that the wishes of the natural mother should be considered, and after considering all the circumstances of the case, I reached

the conclusion, in the exercise of my discretion, that the applicant should have the custody of the infant. It is relevant to observe that the order for custody made by me would result in the infant living not only with his natural mother but with his natural father as well. No order was made as to costs.

Application allowed.

Solicitors:—*R. Ramason*; *Director of Legal Aid.*

M. GORE v. D. S. GORE

[O.C.J. (Gill J.) August 7, 1963]

[K.L. — Civil Suit No. 156 of 1963]

Family Law —Husband and wife—Separation by mutual consent—Agreement to pay maintenance—Default in monthly payment—Whether enforceable.

This was a claim for arrears in maintenance pursuant to a written agreement entered into by the parties by mutual consent. The defendant admitted entering into the agreement, but contended that he no longer consented to the plaintiff and the children living apart from him and that the agreement was no longer enforceable.

Held: the agreement not having been varied or cancelled by agreement between the parties, and no question of its rectification or cancellation having been raised in the proceedings it was still a valid contract and therefore enforceable by the Court.

MOTION FOR JUDGMENT.

K. Y. Chan (Miss) for the plaintiff.

S. D. K. Peddie for the defendant.

Gill J.: This was a motion for judgment under Order 32 rule 6 of the Rules of the Supreme Court, 1957.

The claim was for $3,000, being the amount due to the plaintiff from the defendant under a written agreement entered into by them on 14th September, 1957 whereby the defendant agreed to pay to the plaintiff the sum of $600 on the 28th day of each month by way of maintenance for herself and the three children of the parties. The amount of $600 a month was paid up to 28th August, 1962, but thereafter default was made in the monthly payments. The claim was for five monthly instalments from 28th September 1962 to 28th February 1963.

In his written statement of defence the defendant admitted entering into the agreement in question by mutual consent but contended that he no longer consented to the plaintiff and the children living apart from him and that in the circumstances the agreement was no longer enforceable. He also contended that one or more of the children were gainfully employed and were therefore no longer in need of maintenance.

It is quite clear that the payment of $600 a month was made under a written agreement which was entered into by the parties by mutual consent. The agreement not having been varied or cancelled by agreement between the parties, it is still a valid contract and therefore enforceable by the Court. So long as the contract is in existence the duty of the Court is to interpret it and not to vary it unless the question of its rectification or cancellation is raised by way of counterclaim or by a separate action.

As there was no counterclaim raised in these proceedings, I felt I had no option but to deal with the agreement as it stood on the date of the motion for judgment. In view of the admission made in the written statement of defence and in view of the fact that regular payments were made under the agreement up to August 1962, I gave judgment for the plaintiff as prayed.

Judgment for the plaintiff.

Solicitors:—*Donaldson & Burkinshaw; Skrine & Co.*

DENG ANAK EKOM v. REGINA

[C.A. (Smith, Simpson & McGilligan JJ.) August 16, 1963]

[Kuching — Criminal Appeal No. 2 of 1963]

Criminal Procedure—Sentence—Age of offender—"If it appears to the Court"—Physical appearance—Assessment of age—Benefit of the doubt—Criminal Procedure Code (Sarawak, Cap. 58), s.219.*

In assessing the age of an accused under section 219 of the Criminal Procedure Code (Sarawak, Cap. 58) the opinion of the trial judge based on the physical appearance of the accused is a proper matter to be taken into consideration, but not a very reliable guide, unless the person assessing the age has any specialised knowledge of the people or the race to which the accused belongs.

Case referred to:—

(1) *Najirullah bin Hajirullah & Anor.* v. *R.* (unreported) Jesselton Criminal Appeal No. 8 of 1961.

COURT OF APPEAL (CRIMINAL).

T. O. Thomas for the appellant.

J. W. Williams (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

The judgment of the Court was delivered by,

Smith J.: The applicant, a young Dayak man, Deng anak Ekom, was convicted of murder by the High Court sitting at Kuching and

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Section 219 of the Sarawak Criminal Procedure Code corresponds to section 256 of Singapore Criminal Procedure Code (Cap. 132). *Cf.* section 16, F.M. Juvenile Courts Ordinance, 1947 as amended.